IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.557 OF 2005
IN
WRIT PETITION NO.1666 OF 1996

Tata Housing Development Company Ltd. & Anr. .. Petitioners

Vs.

The State of Maharashtra & Ors. .. Respondents

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Shri J.P.Cama with Ms Shobha Kher with Shri Mahesh Londhe i/b K.P.Anilkumar for respondent No.4 in support of the Notice of Motion

Shri P.D.Gandhi with Shri Majra i/b M/s.Wadia Gandhy & Co. for the petitioners.

Shri A.A.Kumbhakoni, Associate Advocate General with Shri R.J.Mane for the respondent Nos.1, 2, and 3.

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CORAM : R.M.S.KHANDEPARKAR &
V.M.KANADE, JJ

DATED : 20th DECEMBER, 2005.

P.C.

1. Heard. This Notice of Motion is taken out by the respondent No.4 for setting aside the order dated 19th September, 2005 disposing of the writ petition and for restoration thereof. The grounds on which the motion has been filed have been narrated in the

affidavit-in-support of the Notice of Motion and the same are to the effect that the advocate for the applicant was not at all aware about the matter having been fixed for hearing on 19th September, 2005, and therefore, he could not attend the hearing of the matter. It is further case of the petitioners that the clerk of the advocate had also failed to take notice of the matter having been listed on the board sheerly by way of inadvertence. The advocate for the applicant came to know about the hearing of the writ petition on 17th October, 2005 when he was informed about the same by the applicant. The contentions sought to be raised on behalf of the applicant in that regard are denied by the respondent, original petitioner No.1, stating that the matter did not appear for the first time on 19th September, 2005 as sought to be represented before this Court but, in fact, it was on the board from 6th September, 2005 onwards. It was also listed on the board in the week commencing from 12th September, 2005 but the matter could reach only on 13th September, 2005 when it was taken up and it remained part-heard. Consequently, it was adjourned to the next week i.e. 19th September, 2005 and accordingly the matter was heard on 19th September, 2005 and disposed of by delivering the judgment in the open Court.

2. The learned counsel appearing for the applicant placing reliance in the two decisions of the Apex Court viz. **Mahadeo Sakharam Sasane v. Tata Mills Ltd. & Ors.,** reported in 1993 II CLR 706 and **Smt.Lachi Tewari & Ors. v. Director of Land Records & Ors.,** reported in AIR 1984 SC 41, submitted that failure on the part of the advocate, the party could not be penalised and therefore, it is a fit case for recall of the judgment and restoration of the writ petition. The learned advocate for the respondents, on the other hand, submitted that there is no case made out for recall of the judgment and the grounds disclosed for absence of the advocate are without any substance.

3. As rightly submitted on behalf of the respondents, the matter did not appear for the first time on 19th September, 2005. It was infact on the board since 6th September, 2005. There is absolutely no explanation forthcoming from the applicant as to why the advocate did not take note of the said matter which was listed on the board from 6th September, 2005 onwards. There is also no explanation as to what prevented the learned advocate for the applicant from appearing in the Court when the matter was taken up on

13th September, 2005. The affidavit-in-support of the Notice of Motion only refers to the date of 19th September, 2005. In the circumstances, there has been absolutely no cause shown for absence of the advocate for the applicant, either on 6th September, 2005 or on 12th September, 2005 or on 13th September, 2005 for the purpose of attending the hearing of the matter. It is also to be noted that the affidavit discloses that there was no contact between the applicant and her advocate for about 7 years prior to the date of hearing of the matter. This clearly discloses total lack of diligence on the part of the applicant in pursuing with the matter.

4. The Apex Court in **Smt.Lachi Tewari's case (supra)** was dealing with the case where the litigant was vigilant and was seriously pursuing with the matter, and the application for restoration was made within a span of 10 days of disposal of the matter, the applicant had also taken care to engage as many as three lawyers to defend her case. The decision is clearly distinguishable on facts, and therefore, ruling of the Apex Court in **Smt.Lachi Tewari's case (supra)** is of no help to justify the contention sought to be raised by the applicant in the case in hand.

5. The Division Bench of this Court in **Mahadeo Sakharam Sasane's case (supra)** was dealing with the matter where an appeal was disposed of while the advocate for the appellant was on his legs in another Court. That is not the case in the matter in hand. It is not the case of the applicant that her advocate was busy in another Court and therefore the matter came to be disposed of in his absence. It is also to be noted that the fact that the advocate for the appellant in the said case was busy in another Court arguing the matter was specifically brought to the notice of the learned Single Judge, despite the same, the learned Single Judge had dismissed the writ petition. In those circumstances, the Division Bench was persuaded to take the view that the appellant therein ought to have been given an opportunity of being heard on merits. This case is also distinguishable on facts.

6. That apart, it is also to be noted that the applicant has also filed the petition for review of the judgment dated 19th September, 2005 being Review Petition Lodging No.67 of 2005. It has been heard and dismissed on account of failure on the part of the applicant to make out a case for review of the judgment.

7. Since the applicant has not shown sufficient cause for absence on 19th September, 2005 when the matter was disposed of as also on 13th September, 2005 when the matter was partly heard, there is absolutely no case made out for setting aside the judgment dated 19th September, 2005 and hence the Notice of Motion taken out by the respondent No.4-applicant deserves to be dismissed and is hereby dismissed. Order accordingly.

(R.M.S.KHANDEPARKAR, J)

(V.M.KANADE, J)